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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 697

WILSON JENKINS, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION BY THE UNITED STATES TO DISMISS

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Georgia, Savannah Division (Statement 10–24) is reported at 141 F. Supp. 499. The opinion of the United States Court of Appeals for the Fifth Circuit (Statement 25–26) is reported at 238 F. 2d 83.

JURISDICTION

The judgment of the Court of Appeals (Statement 26) was entered on November 2, 1956. Notice of appeal was filed on November 27, 1956. Appellant professes to invoke the jurisdiction of this Court under 28 U. S. C. 1254 (2) (Statement 2).[1]

[1] The Government argues *infra*, pp. 5–6, that jurisdiction by appeal under 28 U. S. C. 1254 (2) is lacking in this case.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction of an appeal from a court of appeals under 28 U. S. C. 1254 (2) in a case where the court below did not invalidate a state statute but merely held it inapplicable to the proceeding before it.

2. Whether in the circumstances of this case the government was entitled to revive a criminal judgment for a fine imposed in 1932 and dormant since 1944.

STATUTES AND RULES OF CIVIL PROCEDURE INVOLVED

Sections 110–1001 and 110–1002 of the Georgia Code; Sections 1042 and 5296 of the Revised Statutes, 18 U. S. C. (1934 ed.) 641; 28 U. S. C. 2462; and Rules 69 (a), and 81 (b), Federal Rules of Civil Procedure, are set forth in the Appendix, *infra*, pp. 14–16.

STATEMENT

This action was brought by the United States in the District Court for the Southern District of Georgia to revive a dormant judgment for a fine. Wilson Jenkins had been sentenced on November 18, 1932, for violations of the National Prohibition Act, the sentence providing that the defendant was to serve a term of two years in the United States Penitentiary and pay a fine of $10,000, the defendant to stand committed until the fine was paid or until otherwise discharged by law (R. 3). The defendant served his minimum sentence under law plus thirty days, as provided by statute, on his failure to pay the fine (R. 40). At the expiration of his minimum sentence,

defendant applied to the United States Commissioner for discharge under the provisions of Section 1042, Revised Statutes (*infra,* pp. 15–16), which governed the discharge of convicts unable to pay their fines (R. 38–39). Twelve days later, on March 12, 1935, upon completion of the required statutory proceedings, the defendant was ordered released from the custody of the Attorney General on the basis of his pauper's petition (R. 39–40).

Execution was issued on the judgment for the fine on June 11, 1937, and was recorded on the General Execution Docket in the office of the Clerk of the Superior Court of Chatham County, Georgia (R. 2). An entry of *nulla bona* was made on the execution by the Deputy United States Marshal (R. 2). The judgment has lain dormant since June 11, 1944, and no portion of the fine has been paid (R. 2).

On September 7, 1955, the Government filed the present action in the District Court to revive the judgment for the fine (R. 1–2). The defendant filed a motion to dismiss, alleging that under Georgia law a judgment dormant for over three years could not be enforced, and that therefore this action was barred by Rule 69 (a), Federal Rules of Civil Procedure (*infra,* p. 16), which makes local execution procedures applicable (R. 7–8). It was further alleged that the time served in addition to the minimum sentence should be considered as being in lieu of the fine and that therefore the $10,000 fine had been satisfied (R. 9–10); and that the suit by the Government to revive the dormant judgment could not be entertained since the National Prohibition Act, for violation of which the fine was

imposed, ceased to be in effect when the Twenty-First Amendment to the Constitution was ratified in 1933 (R. 44–45). On January 9, 1956, defendant's motion to dismiss was denied (R. 16–25).

Defendant thereupon filed his answer, admitting the imposition of the fine and its nonpayment but denying liability on the grounds set forth in the motion to dismiss (R. 26–29). The answer alleged additionally that even if the judgment were revived the Government would still be without any method of enforcement since under Georgia law execution could not issue thereon (R. 28). The Government then moved for summary judgment (R. 25–26) and defendant responded, reasserting his defenses and adding that if no allowance were made for his additional imprisonment, judgment for the fine would be violative of the Fifth, Eighth and Fourteenth Amendments to the Constitution (R. 29–33).

The District Court granted the Government's motion for summary judgment (Statement 23–24). With respect to Georgia law on dormancy and execution, the court held that the United States retains its right of action upon a previously entered judgment notwithstanding a state statute barring enforcement of dormant judgments (Statement 15–17). The court stated that under Rule 69 (a), Federal Rules of Civil Procedure, the Government is controlled by state statutes governing the procedure for filing and acting upon executions, but that the substantive right of revival by bringing suit upon the judgment is not subject to state law and that an action for revival was maintainable in the district court (R. 17–19).

The court rejected defendant's contention that his imprisonment beyond his minimum sentence released him from liability for the $10,000 fine (Statement 20–22). The court also refused to accept defendant's allegation that the judgment could not be revived since the Prohibition Act became inoperative upon repeal (Statement 22).

On appeal, the Court of Appeals for the Fifth Circuit affirmed, *per curiam,* for the reasons given and on the authorities cited by the District Court (Statement 26).

ARGUMENT

1. Appellant seeks review by appeal, under 28 U. S. C. 1254 (2), of the Court of Appeals decision sustaining the Government's revival judgment. It is manifest at the outset that this appeal was improvidently taken since the court below has not held any state statute "to be invalid as repugnant to the Constitution, treaties or laws of the United States"—the jurisdictional prerequisite of that Code provision. Rather, it has affirmed a district court judgment which held that under applicable federal law a dormant judgment previously rendered in a United States district court is not subject to restrictions of local law relative to suits on judgments (Statement 16–20, 26). Absent the necessary jurisdictional foundation, this appeal must be dismissed. Cf. *Long Beach Federal Savings & Loan Assoc.* v. *Federal Home Loan Bank of San Francisco,* 351 U. S. 916, 922; *Colgate* v. *United States,* 280 U. S. 43; *Westling* v. *United States,* 288 U. S. 590; *Pub. Service Comm.* v. *Batesville Tel. Co.,* 284 U. S. 6; *Bradford Electric Co.* v. *Clapper,* 284 U. S. 221.

2. Even if this Court should determine that it has jurisdiction to treat the document filed by Jenkins as a petition for a writ of certiorari,[2] there is no basis for review since the decision of the courts below is plainly correct.

(*a*) Rule 69, Federal Rules of Civil Procedure provides that:

> (a) IN GENERAL. Process to enforce a judgment for the payment of money shall be by a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. * * *.

Undeniably, under this Rule, the Government is bound by state execution procedures when seeking to enforce a judgment rendered in a federal district court. Thus, in the present case, Section 110–1001 of the Georgia Code (*infra*, pp. 14–15), which governs execution procedure in that state, precludes the United States from obtaining execution to enforce the judgment entered against Jenkins on November 18, 1932, since that judgment has lain dormant since June 11, 1944.

---

[2] It should be noted that, while the Judicial Code provides that appeals which are improvidently taken from state court judgments are to be treated as petitions for writs of certiorari (28 U. S. C. 2103), there is no comparable Code provision for improvident appeals from court of appeals' decisions.

It is equally clear that the substantive right of the United States to sue upon that judgment in one of its own courts is not affected by state law. The terms of Rule 69 (a) embrace only state "procedure on execution" and do not encompass the separate and distinct matters of suit upon judgment and state statutes of limitation on such suits. Thus Section 110–1002 of the Georgia Code (*infra*, p. 15), which is a statute of limitations for suits on dormant judgments, clearly does not control actions such as the present one.

In *Custer* v. *McCutcheon*, 283 U. S. 514, this Court was faced with the question of the applicability of state execution limitations to a judgment which the United States sought to have enforced under a statute which was a forerunner of Rule 69 (a).[3] In holding that the time fixed by state statute within which execution must issue applied to the United States, this Court stated (283 U. S. at 519):

> This time limited for issuing executions is, strictly speaking, not a statute of limitations. On the contrary, the privilege of issuing an execution is merely to be exercised within a specified time, as are other procedural steps in

[3] The controlling federal statute in *Custer* v. *McCutcheon* was Section 916 of the Revised Statutes, which provided:

"The party recovering a judgment in any common-law cause in any district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are provided in like causes by the laws of the State in which such court is held, or any such laws which may subsequently be enacted and adopted by general rules of such district court; and such courts may, from time to time, by general rules, adopt such State laws as may be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise; * * *."

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> the course of a litigation after it is instituted. *The plaintiff is not precluded from bringing an action upon the judgment, but merely from having an execution in the form provided by state law.* [Emphasis added.]

This same distinction applies in construing Rule 69 (a). Thus, in *Miller* v. *United States,* 160 F. 2d 608 (C. A. 9), the Ninth Circuit held (160 F. 2d at 609):

> Rule 69 of the Federal Rules, *supra,* makes applicable the California law only as to the remedies of execution and other proceedings "in aid of a judgment." We do not regard the cause of action for a new judgment as a proceeding in aid of the prior judgment creating the cause of action. Such a cause of action is a substantive right in the United States, not its procedural remedy.

See also *Smith* v. *United States,* 143 F. 2d 288, 229 (C. A. 9), certiorari denied, 323 U. S. 729; *United States* v. *Middler,* 127 F. Supp. 686 (E. D. Mich.).

Accordingly, under both the language of Rule 69 (a) and the controlling decisions, whereas local law relative to procedure on execution applies to the United States, the independent substantive right of the Government to sue upon a prior judgment in its favor is not subject to state limitations.[4]

---

[4] Appellant's contention, that the Government's previous attempt to utilize state enforcement procedures in and of itself subjected the United States to local restrictions on revival of judgments, is patently untenable. Either Rule 69 (a) subjects the Government to state time restrictions on suits upon judgments, or it does not—and this obtains irrespective of prior utilization of local collection procedures.

(*b*) It is additionally contended that the Government may not sue to revive its judgment since Rule 81 (b) of the Federal Rules of Civil Procedure abolished the writ of *scire facias* and also that this action is precluded by 28 U. S. C. 2462 (Statement 8–9).

With respect to the former contention, it is true that the Government's district court action was labeled "Scire Facias on Judgment in Criminal Action No. 5865" (R. 1), and that Rule 81 (b) abolishes the writ of *scire facias*. However, the same rule provides that:

> Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.

The United States, of course, may sue upon a judgment imposing a fine in a criminal cause as upon a money judgment obtained in a civil action. *Smith* v. *United States,* 143 F. 2d 228 (C. A. 9), certiorari denied, 323 U. S. 729. Accordingly, the Government's action, which set forth entry of prior judgment and nonpayment, and which prayed "for revival of judgment and judgment against the defendant, Wilson Jenkins, in the amount of $10,000 and costs" may be entertained either as a motion for revival or as a suit upon the prior judgment. Cf. *Reconstruction Finance Corp.* v. *Breeding,* 211 F. 2d 385 (C. A. 10); *Smith* v. *United States,* 143 F. 2d 228 (C. A. 9), certiorari denied, 323 U. S. 729; *Western Surety Co.* v. *United States,* 100 F. 2d 88, 93, (C. A. 9); *Paley* v. *Solomon,* 59 F. Supp. 887, 890 (D. D. C.); 7 Moore's *Federal Practice* (2nd ed.) 4446–4451.

As for 28 U. S. C. 2462,[5] which establishes a five-year limitation for commencement of actions to enforce a civil fine, penalty or forfeiture, it has properly been held that this limitation refers to the lapse of time between the commission of the offense for which the penalty was incurred and the original enforcement action, and imposes no time limit upon the enforcement of the penal judgment. *Smith* v. *United States*, 143 F. 2d 228 (C. A. 9), certiorari denied, 323 U. S. 729.

(*c*) Appellant's allegation that the fine judgment cannot be reviewed in view of the repeal of the Eighteenth Amendment, and the consequent demise of the National Prohibition Act, is equally devoid of merit. The present action is not a proceeding to impose a new sentence, nor does it seek to alter the original sentence. This is merely a proceeding directed toward collection of the original fine which was constitutionally imposed when the Eighteenth Amendment and the National Prohibition Act were in force. Repeal did not invalidate that portion of appellant's prison term which was to be served thereafter, nor did it invalidate the subsisting monetary debt to the Government. Cf. *United States ex rel. Randall* v. *United States Marshal for E. D. N. Y.*, 143 F. 2d 830 (C. A. 2); *United States ex rel. Nerbonne* v. *Hill*,

[5] 28 U. S. C. 2462 provides as follows:

"Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon."

70 F. 2d 1006 (C. A. 3), certiorari denied, 292 U. S. 634; *Odekirk* v. *Ryan*, 85 F. 2d 313 (C. A. 6); *United States ex rel. Cheramie* v. *Dutton*, 74 F. 2d 740 (C. A. 5), certiorari denied, *sub nom. United States ex rel. Cheramie* v. *Freudenstein*, 295 U. S. 733.[6]

(*d*) It is finally contended by appellant that he is entitled to forgiveness of his fine because of the twelve days served beyond the thirty-day period required before a convict may make application for release on the ground that he is unable to pay his fine. This claim is wholly untenable.

It should be noted initially that appellant's original claim in the District Court, that he was entitled to credit for the first thirty days of additional confinement, is refuted both by the statute and the interpreting decisions. Appellant's sentence for violation of the Prohibition Act was that he be imprisoned for two years, that he pay a fine of $10,000, and that he remain imprisoned until the fine should be paid or until otherwise discharged by law (R. 3). The statute (*infra*, pp. 15–16) provided, in substance, that a convict who is unable to pay such a fine shall stand committed for an additional thirty days, and that thereafter the nearest United States Commissioner will consider an application for release based upon in-

[6] The cases cited by appellant (Statement 8) in opposition to the foregoing are not inconsistent. They involve either prosecutions pending at the time of ratification of the Twenty-First Amendment (*United States* v. *Chambers*, 291 U. S. 217) or a change in a previous sentence after repeal (*United States* v. *Sautter*, 17 F. Supp. 326 (M. D. Pa.). This Court expressly stated in *Chambers* that it was not dealing with a case where final judgment was rendered prior to ratification, 291 U. S. at 226.

ability to pay. After completion of the appropriate statutory proceedings (*infra*, pp. 15–16) the Commissioner, if satisfied of the prisoner's inability to pay, and upon the prisoner's taking of a prescribed pauper's oath, shall order the convict's discharge (*infra*, pp. 15–16). In construing the obvious import of these statutory provisions, the Court of Appeals for the Ninth Circuit in *Smith* v. *United States*, 143 F. 2d 228 (C. A. 9), certiorari denied, 323 U. S. 729, stated (143 F. 2d at 229–230):

> The statute * * * merely provides a method whereby an indigent convict may avoid further imprisonment under a judgment committing him until the fine imposed is paid. The obligation to pay the fine is not thereby affected. *United States* v. *Pratt*, D. C., 23 F. 2d 333.

The additional imprisonment beyond the thirty-day term (Statement 8–9) does not prevent the revival of the judgment. The District Court noted that there were required statutory proceedings, with a consequent necessary time lapse after the minimum thirty-day period, before an indigent convict could be discharged. The court held that it must assume, there being no indication to the contrary, that the commissioner did his duty by releasing Jenkins from custody in accordance with the procedural provisions of the statute and that the additional twelve days were necessary and proper (Statement 21–22).[7]

---

[7] It is true that appellant was ordered discharged on March 12, 1935 (R. 39–40) and that he filed an affidavit in the District Court alleging that he was detained twenty-five hours and five minutes beyond that discharge date "against my will" (R. 59). This affidavit was in opposition to one filed by the warden of the

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal should be dismissed.

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FEBRUARY 1957.

Medical Center for Federal Prisoners at Springfield, Missouri, stating that the additional time was to secure transportation (R. 37). However, even assuming this detention to be wrongful, the District Court had no jurisdiction to compromise the criminal judgment. See *Bozel* v. *United States*, 139 F. 2d 153, 156 (C. A. 6), certiorari denied, 321 U. S. 800.

APPENDIX

1. Sections 110–1001 and 110–1002 of the Georgia Code, provide as follows:

> 110–1001. *Dormancy of judgments.*—A judgment shall become dormant and shall not be enforced:
>
> 1. When seven years shall elapse after the rendition of the judgment before execution is issued thereon and entered on the general execution docket of the county wherein such judgment was rendered; or
>
> 2. Unless entry is made on the execution by an officer authorized to levy and return the same and such entry and the date thereof are entered by the clerk on the general execution docket within seven years after issuance of the execution and its record; or
>
> 3. Unless a bona fide public effort on the part of the plaintiff in execution to enforce the execution in the courts is made and due written notice of such effort, specifying the time of the institution of the suit or proceedings, the nature thereof, the names of the parties thereto and the name of the court in which it is pending, is filed by the plaintiff in execution or his attorney at law with the clerk and entered by said clerk on the general execution docket, all at such times and periods that seven years will not elapse between such entries of such notices or between such an entry and a proper entry made as prescribed in paragraph 2.
>
> The record of the execution made as prescribed in paragraph 1 of this section, or of every entry as prescribed in paragraph 2 or in paragraph 3 shall institute a new seven-year period within which the judgment shall not become dormant: Provided, that when an entry

is filed for record more than seven years from the date of the execution, the execution shall be recorded with all entries thereon, but if filed within seven years, the entry shall be recorded on the original record of the execution.

It shall not be necessary in order to prevent dormancy that such execution be entered or such entry recorded on any other docket.

110–1002. *Revival of dormant judgment.*—A dormant judgment may be revived by scire facias or sued on within three years from the time it becomes dormant.

2. Sections 1042 and 5296 of the Revised Statutes, 18 U. S. C. (1934 ed.) 641, provided:

SECTION 641. *Discharge of indigent convicts.* When a poor convict, sentenced by any court of the United States to be imprisoned and pay a fine, or fine and cost, or to pay a fine, or fine and costs, has been confined in prison thirty days, solely for the non-payment of such fine, or fine and costs, such convict may make application in writing to any United States Commissioner in the district where he is imprisoned setting forth his inability to pay such fine, or fine and costs, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter. If on examination it shall appear to him that such convict is unable to pay such fine, or fine and costs, and that he has not any property exceeding $20 in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him the following oath: "I do solemnly swear that I have not any property, real or personal, to the amount of $20, except such as is by law exempt from being taken on civil process for debt by the laws of (naming the State where oath is administered); and that I have no property in any way conveyed or concealed, or in any way

disposed of, for my future use or benefit. So help me God." Upon taking such oath such convict shall be discharged; and the commissioner shall give to the keeper of the jail a certificate setting forth the facts.

3. 28 U. S. C. 2462 provides as follows:

Time for commencing proceedings. Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

4. Rule 69, Federal Rules of Civil Procedure, provides as follows in pertinent part:

(a) IN GENERAL. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. * * *.

5. Rule 81, Federal Rules of Civil Procedure, provides as follows in pertinent part:

* * * (b) Scire Facias and Mandamus. The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.

* * * * *

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IN THE

Supreme Court of the United States

OCTOBER, TERM 1956

No. 697

WILSON JENKINS
Appellant

vs.

UNITED STATES OF AMERICA
Appellee

From The United States Court of Appeals for The Fifth Circuit.

BRIEF IN OPPOSITION TO MOTION BY THE UNITED STATES TO DISMISS

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IN THE

Supreme Court of the United States

OCTOBER, TERM 1956

No. 697

WILSON JENKINS
Appellant

vs.

UNITED STATES OF AMERICA,
Appellee

From The United States Court of Appeals for The Fifth Circuit.

BRIEF IN OPPOSITION TO MOTION BY THE UNITED STATES TO DISMISS

The Appellant, pursuant to United States Supreme Court Rule 16(3), files this his brief in opposition to Appellee's motion to dismiss his Statement As To Jurisdiction heretofore filed. The Motion to Dismiss of Appellee is based on the grounds:

1. The "appeal was improvidently taken since the court below has not held any State Statute 'to be invalid as repugnant to the Constitution, treaties or laws of the United States' ", (Appellee's Motion To Dismiss, p. 5).

2. "There is no basis for review since the decision of the courts below is plainly correct." (Appellee's Motion To Dismiss, p. 6).

(a) "Under both the language of Rule 69(a) and the controlling decisions, whereas local law relative to procedure on execution applies to the United States, the independent substantive right of the Government to sue upon a prior judgment in its favor is not subject to State limitations." (Appellee's Motion To Dismiss, p. 8).

(b) The Government's action in the District Court "may be entertained either as a motion for revival or as a suit upon a prior judgment" under Rule 81(b). (Appellee's Motion To Dismiss, p. 9).

(c) Repeal of the Eighteenth Amendment and the consequent demise of the National Prohibition Act did "not invalidate that portion of Appellant's prison term which was to be served thereafter, nor did it invalidate the subsisting monetary debt to the Government," (Appellee's Motion To Dismiss, p. 10).

(d) "The additional imprisonment beyond the thirty day term does not prevent the revival of the judgment," (Appellee's Motion To Dismiss, p. 11).

Opinions Below

The opinion of the United States District Court for the Southern District of Georgia, announced on May 2, 1956, is reported in 141 F. Supp. 499 (Jurisdictional Statement Appendix A, p. 10). The opinion of the United States Court of Appeals for

the Fifth Circuit affirming the judgment of the District Court is reported in 238 F. 2d 83 (Jurisdictional Statement Appendix A, p. 25).

-3-

Jurisdiction

This proceeding was a scire facias action to revive an allegedly dormant fine judgment of $10,000 imposed November 18, 1932 for conspiring to violate the National Prohibition Act, no longer in force, filed on October 3, 1955 in the United States District Court for the Southern District of Georgia.

The judgment of the District Court granting summary judgment in favor of respondent (R.42) was entered on May 2, 1956, and a copy thereof is appended to the Statement As To Jurisdiction as Appendix A. The petitioner filed a Notice of Appeal to the United States Circuit Court of Appeals for the Fifth Circuit on May 18, 1956 (R. 60).

The Court of Appeals handed down an opinion on November 2, 1956, (R. 70) affirming the judgment of the District Court, which opinion and judgment is hereby prayed to be reviewed. The Notice of Appeal to the United States Supreme Court was filed in the United States Circuit Court of Appeals for the Fifth Circuit on November 27, 1956.

It is respectfully submitted that 28 U.S.C. 1254(2) confers jurisdiction on this Court. The Statute which the United States District Court for the Southern District of Georgia and the United States Court of Appeals for the Fifth Circuit have declared in conflict with the laws of the United States is:

"Code of Georgia, Section 110-1001. *Dormancy of judgments.* A judgment shall become dormant and shall not be enforced:

1. When seven years shall elapse after the rendition of the judgment before execution is issued thereon and entered on the general execution docket of the county wherein such judgment was rendered; or

2. Unless entry is made on the execution by an officer authorized to levy and return the same and such entry and the date thereof are entered by the clerk on the general execution docket within seven years after issuance of the execution and its record; or

3. Unless a bona fide public effort on the part of the plaintiff in execution to enforce the execution in the courts is made and due written notice of such effort, specifying the time of the institution of the suit or proceedings, the nature thereof, the names of the parties thereto and the name of the court in which it is pending, is filed by the plaintiff in execution or his attorney at law with the clerk and entered by said clerk on the general execution docket, all at such times and periods that seven years will not elapse between such entries of such notices or between such an entry and a proper entry made as prescribed in Paragraph 2.

The record of the execution made as prescribed in Paragraph 1 of this section, or of every entry as prescribed in Paragraph 2 or in Paragraph 3 shall institute a new seven-year

period within which the judgment shall not become dormant: Provided, that when an entry is filed for record more than seven years from the date of the execution, the execution shall be recorded with all entries thereon, but if filed within seven years, the entry shall be recorded on the original record of the execution.

It shall not be necessary in order to prevent dormancy that such execution be entered or such entry recorded on any other docket."

"Georgia Code. Section 110-1002. *Revival of dormant judgment.* A dormant judgment may be revived by scire facias or sued on within three years from the time it becomes dormant."

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Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions which are relevant to decision in this case, and the pertinent text of which is set forth in Appendix B of the Statement As To Jurisdiction are Amendments V, VII, XIV, XVIII and XXI of the United States Constitution; Georgia Statutes which are Georgia Code 110-1001 and 110-1002; Federal Statutes, Rule 69(a), Federal Rules of Civil Procedure, 18 U.S.C., 3569.

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Questions Presented for Review

1. Whether this Court has jurisdiction of an appeal from a Court of Appeals under 28 U.S.C. 1254 (2) in a case where the Court below did not totally invalidate a State Statute but merely held it invalid as not applying to the Federal Government?

2. Whether in the circumstances of this case the Government was entitled to revive a criminal judgment for a fine imposed in 1932, dormant under State law which governs procedures in aid of a judgment since 1944, and dead since 1947?

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STATEMENT OF THE CASE

On March 26, 1932, Petitioner, Wilson Jenkins, was charged with violation of the National Prohibition Act and on November 18, 1932, was sentenced to pay a fine of $10,000 and serve two years. Petitioner served the two years and not only the thirty days required for release for one making a pauper's affidavit, but forty-two days (R. 8, 9, 10, 40, 57, 58). There is a conflict of fact as to the additional time served over the thirty days required for release, the Government contending defendant was awaiting transportation for two days as implied in Affidavit of W. W. Steele (R. 36, 38, 39), and the Government is silent as to the period from March 1, 1933, to March 12, 1933, as to why defendant was not released upon the end of the thirty day period required for non-payment of a fine for one taking a pauper's oath on March 1, 1933.

On December 5, 1933, thirty-six states having ratified the 21st Amendment, the 18th Amendment ceased to be in effect and with it fell the National Prohibition Act for which Petitioner was fined for conspiracy to violate said act, and which fine was revived by a new judgment by the District Court on May 2, 1956. The execution on the original judgment of November 18, 1932, was recorded on the general execution docket

of the Superior Court of Chatham County, Georgia, and laid there dormant since June 11, 1944, the last entry of nulla bona having been made June 11, 1937. Under Georgia law a judgment becomes dormant if no entry is made within a seven year period on the execution docket (Georgia Code 110-1001, supra.) and it can only be revived by scire facias within three years after it becomes dormant (Ga. Code 110-1002).

A scire facias petition was filed by the United States on September 7, 1955, seeking to revive the judgment of November 18, 1932, and the District Court for the Southern District of Georgia handed down a judgment reviving the 1932 judgment on May 2, 1956. This judgment of the District Court was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit on November 2, 1956. These opinions are attached to the Statement As To Jurisdiction as Appendix A.

The Statement As To Jurisdiction was filed in the United States Supreme Court on January 17, 1957. A Motion To Dismiss on the grounds as stated in Pages 1 and 2 of this brief was filed by the United States in opposition to which this brief is directed.

ARGUMENT AND CITATION OF AUTHORITIES

1. The Motion to Dismiss filed by the Appellee asserts that this Court has no jurisdiction under 28 U.S.C. 1254 (2) in that the Court below has not held any State Statute ". . . to be invalid as repugnant to the Constitution, treaties or laws of the United States . . ." The Appellant maintains, however, that the Georgia Statute of limitations on judgments has been held invalid in so far as the Court below has held that it does not bind the Federal Government, as the Georgia law does not except the Federal Government from its provisions. (Ga. Code 110-1001, 2, supra, p. 4, 5). The state statute has certainly been declared invalid as repugnant to the laws of the United States in that the Georgia law as to judgments being dead after 10 years has been held not to apply to the United States. But even if the appeal is technically incorrect, which the Appellant does not concede, it is manifest under 28 U.S.C. 2103 that if the appeal were from a state court that the appeal could be treated as a petition for certiorari, and there is no reason for a different rule here.

Appellant respectfully requests that the same spirit as that of the Federal Rules of Civil Procedure govern the instant question so as to allow the case to be decided on its merits. (See Moore v. Illinois Cent. R. Co., 24 F. Supp. 731 S.D. Miss.)

None of the cases cited by the Appellee in support of the Motion to Dismiss on the grounds of this Court not having jurisdiction under 28 U.S.C. 1254 (2) involve a situation where a State law was held not to

be binding upon the United States as in the instant case. At any rate, Appellant respectfully asks this Honorable Court to postpone determining the jurisdictional question until Appellant can be heard as to the merits of his case.

2. It is contrary to law, equity and justice to allow a new criminal judgment to be rendered at this late date on the now unconstitutional Prohibition law.

(a) The Government is in the anomalous position of having to obtain a new judgment as the old one has become dead under State law which governs procedure supplementary to and in aid of a judgment under Rule 69(a) Federal Rules of Civil Procedure. (See Statement As To Jurisdiction, p. 30) *In Seibels v. Hodges*, 65 Ga. 245, the Georgia Court held that: ". . . Where ten years have elapsed from the date of the judgment, and no fi fa was issued, or if issued, no levy was made, and no steps taken as provided by law to revive the same, proceeding by scire facias is barred . . ." The Government is thus forced into having to obtain a new judgment upon its dead judgment. However even if this could legally be done, the Government admits in its Motion to Dismiss, page 6, that it is ". . . bound by State execution procedure when seeking to enforce a judgment rendered in a Federal District Court . . ." but the only manner in which the Government can enforce its new judgment is by State execution procedure under Rule 69 and State law prohibits such action. (Ga. Code 110-1001, 2, Supra.) Seibels v. Hodges, Supra.).

But irrespective of the execution difficulties which the Government finds it is involved in, the Govern-

ment has been forced to obtain a brand new judgment on the now unconstitutional Prohibition Act. It is apparent that such a proceeding is manifestly unjust irrespective of the procedural difficulties the Government finds itself in. In cases where it is manifestly unjust for the Government to take advantage of its laches the courts have refused to assent to such action.

In *The Falcon. The Powhattan.*, 19 F. 2d 1009, 1014 (D.C.D. Md.) the court said:

> "While mere delay, either by limitations or laches, does not of itself constitute a bar to suits of the United States, yet when a sovereignty submits itself to the jurisdiction of a court of equity and prays its aid, its claims and rights are adjudicable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances . . ."

In *Walker v. United States*, 139 Fed. 409, 412 (C.C.M.C. Ala.) involving a suit by a Marshal to recover fees paid out, the court said:

> ". . . When the sovereign sues, he brings with him no privileges which exempt him from the common fare of suitors . . ."

Also it is interesting to note that the Federal Government was held subject to the same exemptions as private persons in case of execution on judgments in *Clerk v. Allen*, 114 Fed. 374, 377 (D.C., W.D. Va.):

> ". . . Nothing can be more clear than this (referring to section 1042, Rev. St.) as a recognition by congress that in case of execution upon

judgments in civil actions the United States are subject to the same exemptions as apply to private persons by the law of the state in which the property levied on is found; and that, by this provision in favor of poor convicts, it was intended, even in cases of sentences for fines for criminal offenses against the laws of the United States, that the execution against property for its collection should be subjected to the same exemptions as in civil cases . . ."

(b) The entire record of the case, including the judgment of the District Court, is so permeated with a discussion of the nature of a "scire facias action" and is so predicated upon this constituting a "scire facias action" that the Government can hardly contend that the only defect in the proceeding lay in the case-style. (Statement As To Jurisdiction, p. 22, 23.)

(c) The Government in its Motion to Dismiss contends, referring to the 18th Amendment to the United States Constitution, that ". . . Repeal did not invalidate that portion of Appellant's prison term which was to be served thereafter, nor did it invalidate the subsisting monetary debt to the Government." (Motion to Dismiss of Appellee, p. 10)

In the case of *United States ex rel. Randall v. United States Marshal For Eastern District of New York*, 143 F. 2d 831 (C.A. 2), involving the repeal of the National Prohibition Act strongly relied on by the Appellee, the Court said: ". . . The commitment was a ministerial and not a judicial act which did not prevent the judgment from becoming final prior to the date of the repeal . . ." The Court thus intimated

that a different result would be arrived at if a new judgment was obtained.

Conceding for argument that the judgment is not vacated or the execution of the sentence is not arrested, still at this late date a new judgment reviving the old may not now be had. The difficulty of the Government's position is found in quoting the case of *Miller v. United States*, 160 F. 2d 608 (C.A. 9), (Motion By The United States To Dismiss, p. 8.) ". . . We do not regard the cause of action for a new judgment as a proceeding in aid of the prior judgment creating the cause of action . . ." In the Miller case and in no other case has the Government been able to cite a new judgment allowed to be taken on an unconstitutional law either in its briefs in the District Court or the Court of Appeals. *United States v. Middler*, 127 F. Supp. 686 (E.D. Mich.) strongly relied upon by Appellee involved draft evasion. *Smith v. United States*, 143 F. 2d 228 (C.A. 9) strongly relied upon by Appellee involved a violation of the Tariff Act of 1922.

In *Odekirk v. Ryan*, 85 F. 2d 314 (C.A. 6), strongly relied upon by Appellee in its Motion to Dismiss, the Court in passing on a commitment for conviction of violation of the Prohibition Act, prior to its repeal had this to say:

> ". . . Here the judgment was pronounced before the repeal of the law violated, the law being the authority for the judgment. A commitment is in no sense a new judgment but is a ministerial act done pursuant to a judgment. The authority for it, as indicated in the cases

> cited, is not the law violated but the judgment which the law authorized, and the judgment being valid, the commitment must stand or fall with it and is also valid, though effected after repeal of the law . . ."

This language also suggests that a different question would be presented if a new judgment rather than a simple ministerial action was necessary.

Appellant's argument is that on an unconstitutional law, revival proceedings may not be had at this date and that a new judgment cannot be obtained on the now unconstitutional law.

The Government is in the anomalous position of being unable to obtain a new judgment as through negligence it allowed the original one to become dead under State law and substantive revival cannot now be had under the instant proceeding as a new judgment cannot be obtained on the unconstitutional Prohibition Act.

In *United States v. Ionoff*, 8 F. Supp. 77, 78 (D.C.M.D. Pa.) the Court said:

> ". . . The sentence of June 8, 1933, did not impose a term of imprisonment. Without deciding whether said sentence of June 8, 1933, was a final judgment, this court cannot now for the first time impose a jail sentence for violation of the National Prohibition Act. If the said judgment was final, this court cannot now change or amend it, or impose a new sentence in lieu of that originally imposed. 36 Op. Attys. Gen. 186; U.S. v. Hill (D.C.) 6 F Supp 922,

affirmed August 8, 1934, 72 F. (2d) 826 (C.C.A. 3rd Circuit); U. S. v. Chambers, 291 U.S. 217, 54 S. Ct. 434, 78 L. Ed. 763, 89 A.L.R. 1510."

"If the judgment was not final, this court cannot now render a final judgment imposing a jail sentence. U. S. v. Chambers, supra . . ."

A fine judgment is not a debt to the sovereign as the Court stated in *United States v. Bailey et al*, 52 F. 2d 286, 287 (D.C.S.D. Ga.):

". . . Authority may be found that a fine or penalty expressed in a judgment is a debt to the sovereign and possibly some ill-considered statement may declare that it arises out of a 'common law case,' but manifestly Congress did not concur in such views . . ."

If there can be no change or amendment or new sentence judgment, how can there be a new fine judgment, the same thing precisely?

(d) Finally, Appellant respectfully contends that his affidavit states he was confined in the penitentiary for a period beyond the legal time of confinement, and his constitutional rights were abused. This may be an old forgotten, faraway happening but it is still fresh as far as his rights under the United States Constitution are concerned, and Appellant respectfully maintains if a conflict of fact exists in this regard, the District Court should not have granted summary judgment.

CONCLUSION

For the foregoing reasons and the fact that a new judgment rather than a ministerial act has been performed on an unconstitutional law, Appellant prays that Appellee's Motion to Dismiss be overruled.

Respectfully submitted,

BOUHAN, LAWRENCE, WILLIAMS & LEVY

By 